No. 14457

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TAKESHI TAMADA,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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Appellant will reply to appellee's arguments in the order discussed by him.

A.

The Question of the Burden of Proof (Reply to Appellee's Br. 7).

Appellee's argument as to the burden of proof under Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) does not reach the issue in this case. Under that section, all that need be shown is (1) that plaintiff claimed a right or privilege as a national of the United States; (2) that he was denied such right or privilege (3) by a Department, agency or executive official thereof (4)

upon the ground that he is not a national of the United States. Having done that, he has established his right to a judicial determination as to whether he is a national of the United States.

Appellee concedes that plaintiff proved all the above mentioned elements (Appellee's Br. 3, 4). Accordingly, there is no question in this case as to plaintiff's right to a judicial declaration.

The matter of burden of proof revolves around the question as to who has the burden of proving expatriation, the Government or the person who admittedly was born a citizen and as to whom the Government claims he lost that status.

As to this issue, appellee ignores the clear holdings in the cases cited by appellant (Op. Br. 7, 8) and he ignores the many Circuit Court cases under the specific statute here (8 U. S. C. 801(c)) which have held that the burden of proof is on the Government.[1] It must be remembered that this is not a case of a citizen taking steps *to* expatriate himself (*cf. McGrath v. Abo,* 186 F. 2d 766, cited by appellee, Br. 7), but is a case of the Government attempting to *impose* expatriation based upon the legal act of a citizen of this country under our laws, who also has the citizenship of another country, not by virtue of his own act, but because the laws of that country also make him a citizen thereof. The case here is of a citizen acting under compulsion of, and pursuant to, the laws

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[1]Appellee cites (Br. 7) *Pandolfo v. Acheson,* 202 F. 2d 38 (C. A. 2, 1953). But that case holds for appellant. Thus the court said (p. 40): "The Government then had the burden of proving that he (plaintiff) had expatriated himself." And *cf.* this case with *Augello v. Dulles,* 220 F. 2d 344, 345 (C. A. 2, 1955) *infra.*

of a country in which he was and whose nationality he possessed at the time.[2]

The Second, Third and Seventh Circuits have unmistakably held that in this type of case the burden is upon the Government.

Lehmann v. Acheson, 206 F. 2d 592, 598 (C. A. 3, 1953):

> "(I)t has long been established that the burden of proving expatriation generally is upon the defendant who affirmatively alleges it and the burden is a 'heavy' one."

Augello v. Dulles, 220 F. 2d 344, 345 (C. A. 2, 1955):

> "(O)n the issue of expatriation the burden of proof was on the defendant."

Schioler v. Secretary of State, 175 F. 2d 402, 403 (C. A. 7, 1949):

> ". . . The burden was therefore upon the Secretary to substantiate . . . this essential fact (expatriation) under 8 U. S. C. 801(a) . . ."

The District of Columbia has likewise so held in *Acheson v. Maenza,* 202 F. 2d 453, 456 (C. A. D. C., 1953):

> ". . . In denaturalization cases, the Government has always been held to a strict degree of proof; it is usually required to prove its case by clear, unequivocal and convincing evidence, not by a bare preponderance which leaves the issue in doubt. . . . We can see no reason for imposing a lighter burden on the Government if it seeks to show the expatria-

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[2]*Cf.* this country's treatment of such persons in regard to our own draft law in *Takeguma v. United States,* 156 F. 2d 439 (C. C. A. 9, 1946).

tion of a native-born citizen. Certainly the annihilation of the right is equally disastrous to the person affected in one case as in the other. . . ."

Cf. Alata v. Dulles, 221 F. 2d 52 (C. A. D. C., 1955).

The Ninth Circuit has not directly passed upon the question, but its pronouncements all point to the same rule. In *Attorney General v. Ricketts,* 165 F. 2d 193, 195 (C. A. 9, 1947), this court would not permit expatriation based upon equivocal conduct. In *Fukumoto v. Dulles,* 216 F. 2d 553 (C. A. 9, 1954), this court did not decide the question because it held that on the ordinary burden of proof plaintiff had shown that his conduct had been involuntary and the court reversed a trial court's finding of fact on this issue.[3]

We submit that the direct holdings by the Second, Third and Seventh Circuits, the rationale of the cases from the District of Columbia and from this circuit, and the holdings and rationale of the cases from the United States Supreme Court (cited at pp. 7 and 8 of App. Op. Br.) compel the rule of law contended for by appellant.

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[3]*Shew v. Dulles,* 217 F. 2d 146 (C. A. 9, 1954), cited by appellee (Br. 7) is inapposite to the case at bar. That case involved a question of the plaintiff proving that he had United States citizenship in the first place. As the cases show, this is a very different case from one where the plaintiff is admittedly born a citizen and the Government seeks to expatriate him.

1.

Service in the Army of a Foreign State by One Holding the Nationality of That State and by Virtue of the Compulsory Conscription Laws of That State Is Prima Facie and Presumptively Involuntary (Reply to Appellee's Br. 7-8).

In support of his position that there is no such presumption, appellee cites (Br. 7, 8) four cases: *Pandolfo v. Acheson,* 202 F. 2d 38 (C. A. 2, 1953); *In re Gogal,* 75 Fed. Supp. 268 (D. C., 1947); *Hamamoto v. Acheson,* 98 Fed. Supp. 904 (D. C., S. D. Cal., 1951); and *Kondo v. Acheson,* 98 Fed. Supp. 884 (D. C., S. D. Cal., 1951).[4] These cases do not assist appellee.

The *Pandolfo* case supports appellant. As the Court of Appeals for the Second Circuit said (202 F. 2d at 41):

> ". . . The trial court found that the plaintiff acted under duress as he testified and as may reasonably be believed under the circumstances, since Italy regarded him as an Italian citizen, subject to military service. . . ."

Moreover, the same court in its latest case clearly concurred with the *Lehmann* decision (*supra,* f.n. 4) that military service due to conscription is *prima facie* involuntary. Thus, in *Augello v. Dulles,* 220 F. 2d 344, 347 (C. A. 2, 1955), the court said:

> ". . . the fact of the plaintiff's conscription into the Italian army was sufficient proof of duress to

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[4]Appellee also mentions *Lehmann v. Acheson,* 206 F. 2d 592 (C. A. 3, 1953), which unquestionably supports appellant, but he does not distinguish that case.

preclude a finding that his consequent taking of the oath was voluntary. . . .

". . . since there was no evidence to rebut the inference of duress flowing from the plaintiff's status as a conscript, there is no need to remand for further findings.

"Reversed with a direction to grant the declaration sought."

In re Gogal similarly supports appellant. There the District Court held that plaintiff's military service under conscription was involuntary and that therefore an oath of allegiance to Czechoslovakia taken in connection therewith was likewise involuntary. Moreover, the entire tenor of the case shows a strong understanding by the court of the involuntary nature of military service by conscription. Thus it points out, *inter alia,* that military service "where the avoidance thereof is not within the power of the individual" (75 Fed. Supp. at 271) does not result in loss of citizenship.

Only the *Hamamoto* and *Kondo* cases held for the defendant. However, in the light of the imposing weight of appellate court decisions from several circuits, as well as from the District Courts,[5] we submit that these two cases are scant authority. They were both decided before these appellate cases were decided and were rendered without the benefit of the guidance which those cases afford.

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[5]Some of these are cited in Appellant's Opening Brief (pp. 9-14). Others are *Ishikawa v. Acheson,* 85 Fed. Supp. 1 (D. Haw., 1949); *Shibata v. Acheson,* 86 Fed. Supp. 1 (S. D. Cal., 1949); *Ozasa v. Acheson,* 94 Fed. Supp. 436 (S. D. Cal., 1950); *Terada v. Dulles,* 121 Fed. Supp. 6 (D. Haw., 1954); *Yoshida v. Dulles,* 116 Fed. Supp. 618 (D. Haw., 1954).

Moreover, we believe them to have been erroneously decided.[6]

Appellee does not attempt to distinguish the cases cited by appellant, particularly the obvious implication of the holding of the Supreme Court in *Adams v. Maryland,* 347 U. S. 179, 181. Nor does appellee attempt to explain the anomaly between the Government's position here and its position before the Supreme Court in *Mandoli v. Acheson,* 344 U. S. 133, 135, where it conceded, and the Supreme Court agreed[7] that "the choice of taking the oath or violating the law was, for a soldier in Fascist Italy, no choice at all.[8]

In that same opinion of the Attorney General (41 Op. Atty. Genl. No. 16), he said (p. 3):

> ". . . Generally, it may be assumed that an act performed under legal compulsion lacks the voluntariness of choice that is essential to accomplish expatriation . . ."

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[6]The absence of appeals in these two cases is explained by the fact that subsequent to these trial court decisions, the plaintiffs were restored to their United States citizenship under the provisions of Section 317c of the 1940 Nationality Act (8 U. S. C. 717c), now repealed.

[7]The fact that the Government confessed error and that the Supreme Court acquiesced, is not to be passed over lightly. It is firmly established that the Supreme Court is in no way bound by the Government's confession of error and will independently examine the issues involved. (*Gibson v. United States,* 329 U. S. 338, n. 9; *Young v. United States,* 315 U. S. 257, 258-259). And this was demonstrated in *Weber v. United States,* 315 U. S. 787, where the court affirmed the lower court despite the Government's confession of error. (Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States,* p. 666 (1951 ed)).

[8]Both the courts in *Lehmann* (206 F. 2d at 598) and in *Alata v. Dulles,* 221 F. 2d 52, 55 (C. A. D. C., 1955), the latest appellate case on the subject, felt constrained to comment upon the anomalous position of the Government.

We submit that this pronouncement by the Attorney General is correct and that in different language he is saying what the courts in *Lehmann* and *Augello* said: that military service due to conscription is presumptively and *prima facie* involuntary.

2.

Plaintiff's Burden Is a Very Light One in a Case Like This (Reply to Appellee's Br. 9-10).

As the cases cited and discussed by appellant so clearly demonstrate, appellee's reliance upon 8 U. S. C. 802, to prove his case, is misplaced. He misconceives the purpose and effect of that section.

Appellee cites (Br. 9), *Dos Reis ex rel. Camara v. Nicolls,* 161 F. 2d 860 (C. C. A. 1, 1947). That case is entirely favorable to and supports appellant. As *Dos Reis* points out (161 F. 2d at 868), Section 402 of the 1940 Nationality Act (8 U. S. C. 802) "does not enlarge the content of §401(c)." There can be no loss of citizenship under 8 U. S. C. 801(c) unless the action is voluntary.

Whatever may be the ultimate burdens of the parties in a case like this it is clear that 8 U. S. C. 802 cannot aid appellee in this case because, under the circumstances here, its force is quickly and early spent. For, as the Supreme Court said in regard to the section from which 8 U. S. C. 802 was taken (Sec. 2 of Chap. 2534 of the Act of March 2, 1907; 34 Stat. 1228; 8 U. S. C. 16 and 17):

> "(I)t is a presumption easy to preclude and easy to overcome."
>
> *United States v. Gay,* 264 U. S. 353, 358.

Accord:

Camardo v. Tillinghast, 29 F. 2d 527, 530-531 (C. A. 1, 1928);

United States v. Eliasen, 11 F. 2d 785, 786 (D. C., W. D. Wash., 1926);

In re Alfonso, 114 Fed. Supp. 280 (D. C., D. N. J., 1953).

Moreover, the last three cited cases, as well as *Garcia Laranjo v. Brownell,* 126 Fed. Supp. 370, 372-373 (D. C., N. D. Cal., 1954), make the point, approving the opinion of Attorney General Wickersham (28 Op. Atty. Genl. at 508), that the section has no other purpose than to fix a time limit for a citizen residing overseas beyond which the Government is relieved of the obligation to protect such citizens residing abroad, and that the section does not establish a rule of expatriation.

Kawakita v. United States, 343 U. S. 717, cited by appellee (Br. 10), again supports appellant and not appellee.[9] That case makes it very clear that it was following the court's previous established rule in the *Gay* case that the presumption of 8 U. S. C. 802 is "easy to preclude and easy to overcome," for it said (343 U. S. at 723-725):

> ". . . He (Kawakita) had a dual nationality, a status long recognized in the law . . . The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citi-

[9]In that case the Government stoutly and successfully resisted, for the purpose of sustaining a prosecution for treason, the contention that there had been expatriation.

zenship does not without more mean that he renounces the other . . .

"As we have said, dual citizenship presupposes rights of citizenship in each country. It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other . . ."

It is clearly demonstrated, we submit, that even if 8 U. S. C. 802 were a part of appellee's proof in this case, it was quickly and completely overcome by the evidence that appellant's military service was due to conscription under law, to say nothing of the fact that the conscription was during time of war in militaristic, tyrannical Japan.

B.

On the Ordinary Burden of Proof the Finding by the Trial Court That Appellant's Military Service Was Voluntary, Is Not Supported by the Evidence and Is Clearly Erroneous (Reply to Appellee's Br. 10-11).

We believe that the case should be disposed of on the basis of the principles of law above discussed. Appellee having presented no evidence to rebut the presumption of involuntary conduct, appellant was entitled to judgment and is entitled to a reversal here. (*Lehmann v. Acheson,* 206 F. 2d 592 (C. A. 3, 1953); *Perri v. Dulles,* 206 F. 2d 586 (C. A. 3, 1953); *Augello v. Dulles,* 220 F. 2d 344 (C. A. 2, 1955); *Yoshida v. Dulles,* 116 Fed. Supp. 618 (D. Haw., 1953); *Gensheimer v. Dulles,* 117 Fed. Supp. 836 (D. C., D. N. J., 1954).) We suggest that the facts upon which appellee relies are not sufficient to overcome appellant's showing of involuntary conduct nor to make a showing of voluntary conduct.

Appellee relies to sustain its contention that the terrible punishment of loss of citizenship should be imposed upon appellant[10] on two written statements signed by him [Exs. "A" and "D"] admitted into evidence over objection.[11]

Exhibit "D" is an amazing document, as are the statements therein contained, amazing. It was made on January 13, 1950, before two soldiers of the American Occupation Forces [R. 73].[12] *after* appellant had filed the within law suit[13] and *in connection with his coming to this country* on a Certificate of Identity under 8 U. S. C. 903 *for the purpose of the suit!* [R. 71]. It reads as though it were made by a man in a trance; by a man thoroughly cowed and susceptible to every bidding of his tormentors.

Thus, in the very statement *made for the purpose of facilitating his return to this country as a citizen,* the statement reads [Ex. D, p. 2]:

> "I do not possess the rights to return to the U. S. and *if I do return to the U. S. I will endanger the safety of the U. S."* (Italics added.)

It is incomprehensible that a man, making a statement for the very purpose of assisting his return to the United States, who makes such a statement can be said to have been in his sound mind and acting freely and voluntarily.

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[10]*Cf. Kawakita v. United States,* 343 U. S. 717 for a different attitude by the Government when it considers that a dual citizen did more than was required of him by reason of his dual citizenship status.

[11]We have previously pointed out (Op. Br. 16-18) how this so-called "lying" by appellant previously in Japan, was as to immaterial matters, and how, in any event, under the circumstances in which it was done, is entitled to little, if any, weight on balance.

[12]The circumstances under which the statement was made will be discussed below.

[13]October 18, 1949. [R. 6.]

Appellee relies (Br. 11) upon the statement in Exhibit "D" as to the reasons for appellant's entry into the Kempetei, an act performed after he was already involuntarily, as a matter of law, in the Army.

Aside from a consideration of the circumstances under which the statement was made and the obvious wording of the statement by the American soldiers for the very purpose of harming appellant, we submit that the statement is utterly irrelevant to the issues of this case. We suggest that once a person is involuntarily required to serve in the army, and there is no way to get out, as is the case here [see Ex. 16, *Matsuye* case, Japanese Military Service Law], his preference for one branch of the service as against another neither adds to nor detracts from the involuntary nature of his service. Appellee's argument on this score is, in effect, that appellant by his subsequent conduct has "ratified" a previously expatriating act. The Government has advanced this argument before and it has been rejected. In *Pandolfo v. Acheson,* 202 F. 2d 38, 41 (C. A. 2, 1953), the court said:

> "If the 1933 oath was taken voluntarily, it needs no ratification as an expatriating act. If it was done under duress, subsequent conduct cannot make it voluntary."

See also:

Baumgartner v. United States, 322 U. S. 665, 677.

Nor does appellee's reliance (Br. 11) on the statement by appellant that he took a daily oath to do his best for the Emperor and for Japan bolster his case. Compare a similar fact, in *Kawakita v. United States,* 343 U. S. 717, 723-724. There the Government sought to prevent expatriation and was successful in taking a contrary position to that it takes here.

The case, thus, is not one which can be blandly disposed of as simply one of a trial court not believing appellant. As to what fact was appellant not to be believed? Certainly there is no question but that appellant was drafted pursuant to the compulsory military service law from which there was no escape, and that this was done under the circumstances then extant in Japan [see *Matsuye* Exs. 13, 14, 15 and 16].

To interpolate from *Acheson v. Maenza,* 202 F. 2d at 459: the evidence in this case "must be considered in connection with the well known ruthlessness of the (Japanese) regime which (in December, 1944) would hardly have tolerated resistance to its draft laws by an admitted national of (Japan)." Appellant obeyed the draft order, it will be remembered, because had he not done so, in the words of appellant, "the gendarme will get me, and I feared that I may be punished, and I also feared about the welfare of my family, and then my family be treated as a traitor perhaps if I take that action." [R. 27, 28.]

Of like effect as *Maenza* is *Alata v. Dulles,* 221 F. 2d 52 (C. A., D. C., 1955), calling attention to the Supreme Court's decision in *Mandoli v. Acheson,* 344 U. S. 133, and to the "strong" rule that "factual doubts are resolved in favor of citizenship" (221 F. 2d at 54 and 56).

The *Alata* case, as well as the previously cited *Perri, Lehmann* and *Augello* cases are doubly important because in them the Circuit Courts reversed trial courts on the very issue of voluntariness.[14]

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[14]There perhaps has not been sufficient time for a decision on certiorari in the *Augello* and *Alata* cases but, Shepard's Federal Reporter Citations fails to disclose that certiorari was sought in the *Lehmann* or *Perri* cases. In the light of the Government's conduct in the *Mandoli* case, we believe this absence of a request for review is significant.

Compare, also, similar action by this court in *Fukumoto v. Dulles,* 216 F. 2d 553, where the appellant actually applied for naturalization in Japan and the trial court found this to have been voluntary. This court said (216 F. 2d at 555):

> "It is apparent the District Court had no proper realization of what motivation drove Fukumoto to apply for citizenship."

C.

The Voting Issue (Reply to Appellee's Br. 12).

Since appellee agrees with appellant as to the proper disposition of this issue in the case, no extended reply is submitted.

We call the attention of the court however, to Senate Report 1178, 83rd Congress, 2nd Session, to accompany S. 1303 (the Watkins Bill), wherein the committee in reporting favorably on the bill, said (p. 4):

> ". . . Under the circumstances as they existed at the time the elections were held in Japan it becomes apparent that many of the former United States citizens unintentionally lost their citizenship under circumstances which amounted to duress, such as fear of loss of their ration cards, employment, or other vital necessities or the fear of the possible consequences which they might suffer in view of the admonition and urging by the occupation authorities to vote . . ."

D.

Exhibits "A," "C" and "D" Were Improperly Admitted Into Evidence (Reply to Appellee's Br. 13-14).

We have shown above how nothing contained in these exhibits should be permitted to defeat appellant's case. We discuss their admissibility, however.

Since appellant testified in court substantially the same as in Exhibits "A" and "C," under the trial court's own theory as to the admissibility of such documents [R. 66], they should not have been admitted.

Appellee's main reliance is upon Exhibit "D."

As to its admissibility on impeachment grounds, this cannot be because when confronted with this statement, appellant admitted making it [R. 57] as well as the various statements in it [R. 59, 61].

Nor was it admissible on a theory of its being an admission.[15]

We submit that the circumstances under which the statement was obtained offends the ordinary sense of justice, violates all concepts of fair play, and its admission into evidence violated appellant's right to due process of law.

Thus the following appears from the record: that the statement was given to two American soldiers who were in the CIC, defined by appellant as the Intelligence Corps of the United States Army, and believed by appellant to be M.P.'s [R. 78]; that he was forced by these soldiers

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[15]When the Exhibit was first offered into evidence [R. 65], the court sustained an objection thereto and explained why. [R. 66.] Then later, without explaining the reason for changing its ruling, the court admitted the Exhibit. [R. 81.]

to say that he entered the Kempeitai to render greater service to Japan [R. 59]; that he was "pressed" to make the statement [R. 71]; that he "was struck five or six times" in connection with the making of the statement [R. 72]; that he was told by the soldier "to write all these things which I didn't have in mind" [R. 73]; that the statement was written after he had been struck [R. 79]; and that "If I wasn't afraid of being beaten up again, I wouldn't have written that statement" [R. 79].

In the light of these circumstances, and bearing in mind the purpose for which the statement was being given, as well as the legal irrelevancy of the statements themselves, we submit that it was gross error and highly prejudicial for Exhibit "D" to have been admitted or considered.

There is no question, of course, but that just as a confession in a criminal case, a prior "admission" even in an ordinary civil case is not admissible if it were not voluntarily made. (*International Paper Co. v. Delaware & H. R. Corporation,* 73 Fed. Supp. 30, 33 (D. C., N. D. N. Y., 1938): "(A)n admission is something voluntarily said or perhaps done.")[16]

Accord:

Hoffman v. Overbey, 137 U. S. 465, 11 S. Ct. 157, 34 L. Ed. 754;

Gaines v. Hennen, 24 How. (U. S.) 553, 16 L. Ed. 770, 788.

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[16]*Cf.* also this statement by the court in connection with points A, B and C, above: "Where . . . the person charged . . . is compelled to use the symbol . . . by the requirements of public policy, whether he will or not, it loses its character as a voluntary act. . . ." (73 Fed. Supp. at 35).

The court below erroneously, we submit, refused to apply this rule of law. Thus the court said [R. 66]:

> "(T)his was not a criminal case nor is this supposed to be a confession, and so it was not necessary to establish the voluntary character by going into it."

Moreover, there is another serious respect in which the lower court's treatment of the exhibit was erroneous. When appellant sought to testify as to later events showing mistreatment of him by the CIC [R. 73][17] in connection with Exhibit "D," the court excluded the evidence, ordering it stricken from the record [R. 75]. The court's reasoning was (*ibid.*):

> ". . . it doesn't tend to prove or disprove anything that was required at the time that occurred. In other words, if he made the statements in January, 1950, anything that happened subsequent to January, 1950, couldn't in any way have induced him to have made the statements in January, 1950.
>
> ". . .
>
> ". . . anything subsequent to the date of the statements in 1950 is not admissible for the purpose of proving that he was coerced or that duress was used in his making of these statements."

This ruling was consistent with *Pandolfo, supra.* Yet the court admitted the exhibit containing the statement of conduct subsequent to conscription upon which appellee so heavily relies. If the occurrences subsequent to the

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[17]Appellant testified that in connection with later interrogation by the CIC as to Exhibit "D", he was "struck" [R. 73]; he was questioned so severly that he "became ill and fainted" (*ibid.*); that he was "told to appear every day for four or five days consecutively" (*ibid.*). But this testimony was stricken. [R. 75.]

making of the statement of January, 1950, do not "tend to prove or disprove" [R. 75] the voluntary character of the statement, no more do the occurrences, as *Pondolfo* points out, subsequent to the conscription into the army tend to prove or disprove the voluntary character of the Army service.

Conclusion.

The judgment should be reversed and appellant declared to be a national of the United States.

Respectfully submitted,

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